IN THE NORTH GAUTENG HIGH COURT

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 38006/2010

In the matter between:

LEONARDUS JOHANNES STRYDOM NO	Applicant

15/10/2010

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE. YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED
15/10/10
DATE
SIGNATURE

and

MASTER OF THE HIGH COURT	First Respondent
DIMAKATSO ARNOLD MICHAEL MOHOASOA NO	Second Respondent

JUDGMENT

TUCHTEN J:

1 This is a review application which came before me in the unopposed motion court. There was no appearance for either of the respondents. The applicant and a Mr Musenwa were appointed co-provisional liquidators in the liquidation of Coal Experts (Pty) Limited ("Coal

Experts").[1] The applicant says he was, presumably by agreement with Musenwa, charged with the day to day administration of Coal Experts.

2 On 13 December 2009, Musenwa and the applicant decided to approach the Master with what is described in the papers as an application for the payment of a provisional liquidators' fee in terms of reg 24 of the Regulations for the Winding-Up and Judicial Management of Companies[2] ("the regulations") and annexure CM 101 thereto read with s 403 of the Companies Act, 61 of 1973.

3 Section 403 of the Companies Act obliges every liquidator, a term that includes a co-liquidator and a provisional liquidator unless the context otherwise indicates,[3] to frame and lodge accounts with the Master containing an account of receipts and payments and a plan of distribution.

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1 Coal Experts was placed under provisional winding-up order on 12 February 2009. According to the court file in *Edey v Coal Experts (Pty) Limited*, case no. 6790/09 in this court, of which I take judicial notice, the winding-up order was made final on 9 November 2009.

2 Promulgated under GN R2490 of 28 December 1973 and amended from time to time.

3 Definition of liquidator in s 1.

4 Regulation 24 reads as follows:

> Every liquidator shall be entitled to the remuneration set out in Annexure CM 104.

5 Annexure CM 104 to the regulations provides for a tariff of fees payable to liquidators. Item I(b) of CM 104 specifically provides that where a winding-up order has been made but the provisional liquidator does not continue as liquidator, the Master is empowered to tax a fee with due regard to the special circumstances of the case.

6 Annexure CM101 provides general directions on the form and contents of liquidators' accounts. Item 5 of CM101 reads:

> The account of payments may provisionally be credited with the amount claimed in respect of the liquidator's remuneration, but no such remuneration or part thereof shall, except by permission of the Master ... or the Court, be drawn until the account in which it appears has been confirmed.

7 The applicant says he entrusted Musenwa with the duty of submitting the application for payment of their provisional fee to the Master. Why he should have done so in this single instance is not explained in the papers. The applicant is a professional liquidator, as such is in regular communication with the Master's office and must have office staff or

systems which deal with such routine matters. Be that as it may, the applicant says that Musenwa produced a document ostensibly conveying the approval of the Master to the immediate payment of a provisional fee of R500 000. Although the allegations in this regard are couched in circumlocutions, the applicant's case is that this document was forged by Musenwa and that the applicant was induced by the forgery to hand over R200 000 of Coal Experts' money to Musenwa.

8 What in fact happened is that by letter bearing the Master's (genuine) date stamp of 18 December 2009, the Master responded to the application for payment of the provisional fee through an Assistant Master, Mr Cilliers. The letter communicated the Master's opinion that

> we cannot approve your application and your fees will only be taxed when a first account is submitted and a distribution is made.

9 The applicant says that he then unsuccessfully tried to stop payment of the estate cheque to Musenwa. There followed an interrogation by Mr Cilliers of the applicant and Musenwa and an undertaking by Musenwa to repay the money taken by him. The money has not been repaid and the applicant has laid theft charges against Musenwa.

Musenwa was removed as joint provisional liquidator by the Master on 28 January 2010.

10 On 5 March 2010 the applicant and the second respondent were appointed joint liquidators in the winding-up of Coal Experts. The applicant then had discussions with officials from the Master's office and, so he says, was advised by Mr Cilliers to lodge a provisional liquidator's account up to the date of the first meeting of creditors.

11 The applicant framed such an account and submitted it to the Master under cover of a letter dated 5 March 2010. The account makes provision for liquidators' fees excluding VAT of R1 134 869,91. In the letter the applicant recorded that Mr Cilliers and the applicant were busy conducting certain investigations into the irregularities committed by Musenwa but that at that date, the enquiries had not been finalised. No indication is given about what these enquiries might be. As it seems that Musenwa's participation in the administration of Coal Experts was limited to carrying the application for provisional payment of the fees to the Master and forging the document of approval of this payment, it is not clear why the enquiries have not been completed.

12 The letter goes on to convey the applicant's contentions as to why he (and Musenwa) should receive a provisional payment. The grounds advanced appear to be that the provisional liquidators have done a substantial amount of work and have recovered assets of value in and associated with the estate and that the work still to be done by the liquidators in winding up the estate is of limited extent.

13 The task of scrutinising the provisional account was allocated to Mrs Jordaan, an official in the Master's office who had not been associated with the discussions held between the applicant and other officials. Mrs Jordaan refused to approve the provisional account and refused to tax the provisional liquidators' fees. Her reasons for the refusal were conveyed in a letter bearing the date stamp 12 March 2010 and are that there would be no benefit to creditors from an early payment, that there was no reason why a first liquidation and distribution account as such could not be lodged and that the application for payment of the provisional liquidators' fees was just another form of the application in terms of CM101 which had been rejected on 18 December 2009.

14 This prompted the applicant to write a letter dated 17 March 2010 to the Master. In it he submitted that the reasons given in the Master's letter date stamped 12 March 2010 were not rationally connected to

the information placed before the Master. He urged the Master to have regard to the fact that by agreement with the officials with whom discussions had been held, the account would have a twofold purpose, namely:

14.1 to give an analysis of the applicant's administration of the estate which, if found to be in order, *would absolve the [applicant] of any liability in respect of the irregularities occasioned by [Musenwa]*;[4] and

14.2 to enable the final liquidators to finalise the remaining matters in the estate.

15 The payment of the provisional liquidator's fees, the applicant suggested in the letter, was not the primary purpose of the application. This is curious, to say the least, because the admitted purpose of the approach to the Master in the first place had been to get authority for payment of these very fees.

16 Further discussions followed on 15 April 2010 between a director of the company for which the applicant worked (Mr van Rensburg), the applicant and a number of officials of the Master's office. The

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4 My emphasis

discussions did not produce results to the satisfaction of the applicant and his co-director. Mr van Rensburg wrote an ill-tempered letter dated 3 May 2010 claiming that the provisional account had been submitted pursuant to a suggestion from an official in the Master's office, a suggestion with which another official had concurred, and asserting, in effect, that Mrs Jordaan did not know what she was talking about. This letter elicited a response from the Master himself in a letter dated 11 May 2010 in which he conveyed the denial of the officials that they had asked the applicant to submit a provisional account and recording that the officials [sic] stood by their decision. The applicant launched the present application by notice of motion dated 30 June 2010.

17 The principal prayer in the notice of motion seeks the review and setting aside of the Master's decision not to "accept, consider and/or approve" the provisional account and to tax the fee of the provisional liquidators in accordance with s 384 of the Companies Act and reg 24. The review is brought in terms of rule 53 and ss 6(2)(a), (d) and (e) read with s 8(1)(c) of the Promotion of Administrative Justice Act, 3 of 2000,

18 The application elicited a Master's Report, date stamped 30 June 2010, from the Master, Mr BC Nell. The report says:

> 1 A copy of the Notice of Motion, the Applicant's founding affidavit and the annexures thereto have been served on me.
>
> 2 I confirm that it is not my intention to oppose the application.
>
> 3 I confirm the contents of the Applicant's affidavit in so far as it relates to me and the actions of my sub-ordinates relative to my decision not to accept the provisional account as framed in the estate of Coal Experts (Pty) Ltd (In Liquidation).
>
> 4 I have not further information which may be of assistance to the Honourable Court in the adjudication of this matter and abide the decision of the Honourable Court.

19 The Master records in the report his decision not to oppose the application but he does not say whether he supports or does not support his own decision (made on his behalf by Mrs Jordaan) which is the subject of the review application.

20 This is not good enough. The court is entitled to know what the Master's views are on the merits of the review application, particularly because the issues in this case relate to decisions made by or on behalf of the Master himself and because the competence of Mrs

Jordaan, one of the Master's officials, is under attack. I regret that the Master did not cause counsel to be briefed to be of help to the court in this regard.

21 The primary attack on Mrs Jordaan's decision is that she failed to appreciate that item I(b) of CM104 conferred on the Master a discretion to tax a fee where the provisional liquidator does not continue as liquidator. The applicant submits that joint liquidators are in law one person and that because Musenwa was dismissed as provisional liquidator, the situation contemplated in item I(b) of CM104 has arisen. The applicant submits that because Mrs Jordaan did not appreciate that this was so, her decision was accordingly materially influenced by errors of law as envisaged by s 6(2)(d) of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

22 I was at first inclined to think that there was substance in this submission but on further reflection and a more careful analysis of the facts I am satisfied that the argument is unsound and that Mrs Jordaan got it right. I am prepared to accept for the sake of argument that the applicant is correct when he says that the situation contemplated in item I(b) of CM104 has arisen because one of the provisional liquidators did not continue as liquidator. But that is beside the point: Mrs Jordaan did not decide that the Master had no

discretion to tax the provisional liquidators' fees, ie that as a matter of law the Master *could not* do so: she decided that the Master *should not* do so.

23 Item I(b) of CM104 is silent as to the time when the Master should tax the provisional liquidators' fees. In the circumstances of this case, there is good reason to defer such taxation. This is in essence what Mrs Jordaan decided and in this regard, in my view, she was correct. For example, when all the facts are known, the Master may decide that the provisional liquidators' fees should properly be reduced, having regard to the amount that was misappropriated.

24 The applicant submits further that Mrs Jordaan was mistaken in her conclusion that the provisional account lodged was *just another form of the application in terms of CM101.* Far from employing flawed reasoning and displaying a lack of rationality, Mrs Jordaan in my view saw through the stratagem employed by the applicant. The confessed purpose of the submission of the account under cover of the applicant's letter dated 5 March 2010 was to obtain payment of the provisional liquidators' fees before confirmation of any liquidation and distribution account submitted under s 403 of the Companies Act. Mrs Jordaan saw that this was so and concluded that there would be no

benefit to creditors if the erstwhile provisional liquidators received an early payment of their fees.

25 When Mrs Jordaan made her decision, she was not to know, as I however do, that there was another reason for the submission of the account: that as disclosed in the applicant's letter dated 17 March 2010, the approval of the provisional account was also designed to *absolve the writer from any liability in respect of the irregularities occasioned by the erstwhile provisional liquidator.* I am not sure how the approval of a provisional account could achieve this result and have not had the benefit of argument in this regard. But it seems to me manifestly undesirable that creditors and other interested parties should be deprived of the opportunity of establishing, if they so wish and the facts bear them out, that the conduct of the applicant in regard to the theft by Musenwa of Coal Experts' money *should* attract liability.

26 The other expressed purpose of the submission of the provisional account, according to the applicant's letter dated 17 March 2010, was to enable the liquidators to finalise the remaining matters in the winding-up of Coal Experts. I cannot see how the approval of the provisional account would advance the finalisation of the winding-up.

27 There is another, more fundamental, reason why Mrs Jordaan's decision was correct. There is no express provision in either the Insolvency Act, 24 of 1936, or the Companies Act providing for the time when a trustee or liquidator may pay himself his fees. But under the common law, a trustee cannot claim or draw his remuneration until the account in the estate showing the amount thereof has been confirmed.[5] This common law principle is by no means repugnant with the provisions of the Insolvency Act, 24 of 1936, and is thus an applicable principle of our insolvency law today.[6]

28 The authorities to which I have referred deal with the position of the trustee in insolvency. In my view, the principle is equally applicable to liquidators.[7] I have referred to the liquidator's obligation to account under s 403 of the Companies Act. Under s 406 the account must lie for inspection for a period of at least 14 days at the office of the Master and, where the registered office of the company is not situated in the same district as the office of the Master, the office of the

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5 *Mars*, Law of Insolvency in South Africa, 9th ed 310; *Meskin*, Insolvency Law looseleaf ed, para 4.21; *Abbott v Bryant* 20 CTR 943; *R v Macleod* 1935 EDL 284; *Elliot Brothers (East London) (Pty) Ltd v The Master and Another NO* 1988 4 SA 183 E 192 letter I; Compare *Ex parte Thomas; Ex parte Thomas* [2002] 4 All SA 227 T **229*g*.**

6 *Mars, op cit,* 13

7 *Henochsberg on the Companies Act* 5th ed, general note to s 384; *Blackman et al*, Commentary on the Companies Act, looseleaf ed, note to s 384. If Coal Experts is being wound up for inability to pay its debts, s 339 of the Companies Act will apply to support this proposition; but I reach my conclusion independently of s 339.

magistrate of that district and, if the company carried on business at any other place, at the office of the magistrate in the district into which that other place falls as well. Notice that the account is lying for inspection must be given in the Government Gazette.

29 It was submitted on behalf of the applicant that these sections cannot apply to provisional liquidators because a provisional liquidator is not called upon to liquidate or distribute the assets of a company in liquidation. This is no doubt the general position but it is not always so. In this very case, the provisional liquidators disposed of assets by public auction and got in proceeds of at least R10 million. Furthermore, the submission does not seem to me to explain why the provisional liquidator's account, whatever it contains, should not lie for inspection and be open to objection under the Companies Act. The applicant submits that his provisional account will lie for inspection as an attachment to the liquidator's account. But by then, if the applicant gets his way, the fees dealt with in the provisional account will have been paid out, to the potentially irreversible prejudice of creditors. To use the language of the definition of liquidator in s 1 of the Companies Act, I do not see that the context of these sections indicates that provisional liquidators are to be excluded from their reach.

30 The wide publicity given to the account is obviously intended to achieve a wide degree of publicity about how the liquidator has carried out the duties of his office. Under s 407, there is provision for objections to the account and for how any such objection is to be adjudicated. Ultimately, an aggrieved objector can approach the court for relief.

31 After the account has duly lain for inspection and the period for objections has passed without objections having been lodged or, if lodged, dealt with according to law or withdrawn, the Master must, under s 408, confirm the account. Such confirmation has the effect of a final judgment save in limited specified circumstances.

32 The scheme of the sections I have discussed would be significantly retarded if the applicant were permitted in respect of his fees, an important component of any account in a liquidation, to go behind the backs of creditors and obtain provisional payment by an unpublicised administrative process. It follows from this conclusion, in my view, that item 5 of CM101, to the extent that it purports to empower the Master to authorise payment of a liquidator's fees *before* an account specifying the fee the liquidator intends charging has duly lain for inspection and been confirmed, may be *ultra vires* the Companies Act. This is because there is no indication in the Companies Act itself that

the legislature intended to depart from the common law in this regard. It is unnecessary to reach a final conclusion on this question in the present case but manifestly if such a power exists, it should be exercised very sparingly and with exceptional caution.

33 It follows that the review cannot succeed. The application is dismissed.

NB Tuchten
Judge of the High Court
12 October 2010

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For the applicant:
Adv *PA Venter*
instructed by William Tintinger Attorney